



400 South Fifth Street, Suite 200
Columbus, Ohio 43215-5492
(614) 221 1216 PH
(614) 221 8769 FX
www.dhflaw.com

LAYOFFS AND JOB ABOLISHMENTS

CIVIL SERVICE LAWS AND RULES

COLLECTIVE BARGAINING AGREEMENTS

PROVING LAYOFFS AND ABOLISHMENTS

Presented by: Marc A. Fishel
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Hyatt Regency, Columbus, Ohio

400 S. Fifth Street, Suite 200
Columbus, OH 43215
(614) 221-1216
www.dhflaw.com



INTRODUCTION – MARC A. FISHEL

Marc Fishel is a partner in the law firm of Downes, Hurst & Fishel, LLP. He received his J. D. from Ohio State University and a Bachelor of Arts degree in political science from Cleveland State University. Mr. Fishel regularly represents public employers throughout the State of Ohio in all matters relating to labor relations. Marc has extensive experience in areas of representation include collective bargaining matters, disciplinary matters (arbitration and civil service), contract negotiations, mediation, and conflict resolution procedures. Mr. Fishel also represents employers in state and federal courts in employment related litigation. Mr. Fishel is a former member of the Board of Directors of the Ohio Public Employers Labor Relations Association and has served as an adjunct professor of employment law at Wittenberg University. He is a frequent speaker and lecturer on numerous issues relating to employment law.

FIRM PROFILE

Downes & Hurst represents jurisdictions, business entities and individuals throughout Ohio. Attorneys of the firm have extensive experience in public and private sector labor relations, municipal law, business entities and litigation. The size of the firm allows the personal touch of a sole practitioner while furnishing a broad base of experience and support to meet the needs of clients. In addition to labor, civil service, and immigration law, the firm represents clients in complex civil litigation, defends public officials in matters including civil rights, errors and omissions, and a wide-range of employment law matters. The Attorneys of the firm regularly work in conjunction with county prosecutors, city law directors, in-house counsel, and executives providing advice, background information, research and/or consultation on specific issues. These individuals also assume complete responsibility on a matter, such as collective bargaining negotiations or litigation, when requested.

The firm has extensive experience in the development and implementation of policies and procedures for both public and private sector employers. The basic philosophy of the firm is to provide services, which promote the development of systems and human resource management to maximize the goals and direction of the organization and to avoid and minimize conflict. Services are provided to unionized, non-unionized and mixed unionized/non-unionized clients. The firm's perspective is pro-management.

All Attorneys of the firm routinely practice in the courts of common pleas and appellate courts throughout the state, the federal district and appellate courts and before the boards and agencies of state and local governments including the Ohio Bureau of Employment Service, Ohio Civil Rights Commission, Equal Employment Opportunity Commission and the Ohio Department of Commerce.

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PART 1 LAYOFFS AND JOB ABOLISHMENTS UNDER CIVIL SERVICE LAW

INTRODUCTION

Six basic components to layoffs:

1. Establish the rationale and justification for the layoff;
2. Identifying the selection criteria on which the layoff decisions are based;
3. Communicating the plan and its procedures;
4. Making the selection decisions;
5. Reviewing the list of affected employees; and
6. Notifying the employees of the decision.

I. APPLICABLE CIVIL SERVICE LAW

- A. Layoffs and Job Abolishments must be made in accordance with Ohio Revised Code (“O.R.C.”) §124.321 to §124.328
- B. For State and County Agencies, the State Personnel Board of Review (SPBR) and Director of Administrative Services (DAS) promulgated rules in relation to layoffs and job abolishments that the appointing authority must follow. O.R.C. §124.321(A), (E), and (F), and O.R.C. §124.322.

Ohio Administrative Code (“O.A.C.”) §124-7-01 (SPBR rules for “Job abolishments and layoffs”) and §123:1-41 (DAS rules for “Layoffs”).

- a. O.A.C. provisions are not binding law on municipalities
- b. Note: O.A.C. provisions generally mirror the corresponding O.R.C. provisions or add detail to those provisions. Therefore, for the sake of brevity in a summary outline, O.A.C. provisions will not be separately addressed.

For municipalities, the Civil Service Commission (CSC) may establish rules for layoffs and job abolishments. In the absence of CSC rules the municipality shall follow the Revised Code provisions.

- C. Statement of rationale and supporting documentation including whether a lack of funds exists, shall be filed with the Director of the Department of Administrative Services (DAS) for County agencies or the Civil Service Commission (CSC) for municipalities. O.R.C. §§124.321(B)(1) and 124.40.
- D. “Paper layoffs” are now available to determine, before a layoff is implemented, which employees are eligible for displacement, options for

displacement, and ultimately which employees will be laid off. O.R.C. §124.321(E).

II. LAYOFF AND JOB ABOLISHMENT PROCEDURE

A. Valid reasons for layoffs and job abolishments O.R.C. §124.321(B), (C), and (D).

1. Reasons for layoffs

a. Lack of Funds: the appointing authority has a current or projected deficiency of funding to maintain current, or sustain projected, levels of staffing and operations. A lack of funds is “presumed” for those positions funded under grants when such expire. O.R.C. §124.321(B)

b. Lack of Work: the appointing authority has a current or projected temporary decrease in the workload which requires a reduction of current or projected staffing levels. O.R.C. §124.321(C).

2. Reasons for job abolishments O.R.C. §124.321(D). The deletion of positions from the organization or structure of the appointing authority.

a. As a result of a reorganization for the efficient operation of the appointing authority; or

b. For reasons of economy; or

c. For lack of work (permanent).

3. Judicial Definitions: *In re Moreno* (Montgomery 1983), 13 Ohio App. 22, the term “job abolishment” contemplates the permanent elimination of a specific position while “layoff” contemplates the continued existence of a position which is temporarily unfilled because of lack of funds or lack of work.

B. Statement of rationale for layoffs/job abolishments and example, suggested supporting documentation

1. County (and State) appointing authorities must determine whether valid reasons for layoffs or job abolishments exist and shall then file a statement of rationale and supporting documentation with the DAS prior to sending the layoff notice. O.R.C. §124.321(B), (C), (D).

City Appointing authorities must determine whether valid reasons for layoffs or job abolishments exist and it must prepare a statement of rationale for the decision, but does not need to file the statement of rationale unless required by local civil service rules; however, it is advisable to file the statement of rationale with the CSC.

2. Suggested supporting documentation for layoffs and job abolishments:

a. Layoff for lack of work: Documents should provide statistical data covering a period of at least two years that indicates the decrease in workload before and after tables of organization can be used to demonstrate modifications. Also can use work flow documentation (Ex. Data showing a 20% decrease in claims, workload, filed to justify laying off 20% of the staff.)

b. Layoff for lack of funds: Documents should show projected revenues and projected expenditures that should then result in a projected deficit. The deficit should be equated into the number of positions to be laid off and how the layoff action will produce the necessary savings.

c. Job abolishment: Documents should explain how the economy or better efficiency can be achieved as the result of reorganization. Include a table of the organization before and after the job abolishment. If the job abolishment is for lack of work (permanent), then documents should include statistical information over the previous period that indicates the decrease in workload.

i. *Cummings v. Youngstown*, (Mahoning, 1987), No. 86 CA 71, the Ct. held that the documentation supporting a job abolishment need not be in any particular form nor need it be highly technical, but it must be more substantial than someone's opinion. An attached copy of financial records, budgets, cash flow projections or other factual basis supporting the rationale will be adequate.

C. Job abolishment procedures: If an abolishment results in a reduction of the workforce (i.e. layoffs), the appointing authority shall follow the procedures for laying off employees, subject to the following four modifications (O.R.C. §124.321(D)(3)(a)-(d):

1. The employee whose position has been abolished shall have the right to fill an available vacancy within the employee's classification;
 2. If the employee whose position has been abolished has more retention points (these are explained below) than any other employee serving in the same classification, then the employee with the fewest retention points shall be displaced;
 3. If the employee whose position has been abolished has the fewest retention points in the classification, the employee shall have the right to fill an available vacancy in a lower classification in the classification series;
 4. If the employee whose position has been abolished has the fewest retention points in the classification, the employee shall displace the employee with the fewest retention points in the next or successively lower classification in the classification series.
- D. SPBR criteria regarding bad faith allegations, O.R.C. 124.321(D)(2)(b)(i). This rule only applies to state and county agencies but a CSC may utilize this standard.

§124-7-01 Job abolishments and layoffs. (SPBR Rule)

(A) Job abolishments and layoffs shall be disaffirmed if the action was taken in bad faith. The employee must prove the appointing authority's bad faith by a preponderance of the evidence.

(1) The appointing authority shall demonstrate by a preponderance of the evidence that a job abolishment was undertaken due to a lack of a continuing need for the position based on: a reorganization for the efficient operation of the appointing authority; reasons of economy; or a lack of work expected to last one year or longer.

(2) The appointing authority shall demonstrate by a preponderance of the evidence that a layoff was undertaken due to a temporary lack of work or lack of funds expected to last less than one year.

(3) Layoffs and abolishments may only be affirmed if the appointing authority has substantially complied with procedural requirements set forth in section 124.321 of the

Revised Code, et seq., and the administrative rules promulgated pursuant to these statutes.

(B) Certification of lack of funds or lack of work is not required for job abolishments, but if abolishment results from the loss of funding, such must be established in proving layoffs.

(C) When a position is abolished or an employee is laid off, displacement rights, as set forth in division (C) of section 124.321 of the Revised Code, shall be afforded the employee.

(D) Layoffs are governed by division (C) of section 124.321 of the Revised Code and any layoff rules (DAS and SPBR for state and county agencies or Civil Service Commission for municipalities) which apply to a particular appointing authority.

E. Standards for Burden of Proof and Bad Faith

1. *Esselburne v. Ohio Dept. of Agriculture* (Franklin 1988), 49 Ohio App. 37, Court held that the burden of proving that the abolishment was necessary and proper is on the appointing authority, not the employee. The appointing authority must be able to demonstrate by a preponderance of the evidence that a substantive reason existed for the abolishment.

When the employer abolished appellant's position and then immediately appointed an unclassified employee to perform the same work, the employer could not establish a lack of work and the job abolishment was held to be in bad faith.

2. *Bispeck v. Trumbull County Bd. of Commissioners* (1988), 37 Ohio Est. 26. The Ohio Supreme Court held that while the substantive burden of proof is on the appointing authority to show evidence that justifies the abolishment, the employee who alleges bad faith or procedural deficiency in the job abolishment has the burden to prove those allegations.

Legislatures' intent was to require the appointing authority to justify a job abolishment by proving the abolishment would result in more efficient operations. SPBR must consider the operations before and after the abolishment.

3. *Feeney v. Ohio Dept. of Public Safety*, 1996 Ohio App. Lexis 4550 (10th Dist. Ct. App. 1996). Employee reinstated after being terminated as an unclassified employee may have position subsequently abolished. Timing of two actions will require

“closest scrutiny” by SPBR, but abolishment will be upheld where employer can show that work of the unit has been declining due to duplication of programs in other departments and through attrition of subordinates.

4. *Blinn v. Ohio Bureau of Employment Services*, 29 Ohio App. 3d 77 (10th Dist. Ct. App. 1985). Finding of bad faith by employer is not limited to situations in which lay off or abolishment was predicated on personal or political motivation. Bad faith occurs whenever lay offs or job abolishment are used to subvert the civil service system. When employees are “hand picked” to retain employment in positions that were essentially the same as those abolished when federal CETA program was replaced with JTPA program the lay off is in bad faith and the employees must be reinstated.
5. *Swepton v. Bd. of Tax Appeals of Ohio* (Franklin 1993), 89 Ohio App. 629 – Ct. held that while proper job abolishment may occur pursuant to merger of positions when reorganization has taken place for reasons of efficiency and economy, a job is not properly abolished under circumstances in which the appointing authority simply transfers that job’s duties to a new employee to perform.

III. STATEMENT OF RATIONALE AND REASONS OF ECONOMY

- A. Statement of rational and supporting documentation and supporting documentation must be filed with DAS, for County agencies, or the CSC, if required by rule of the CSC (but is advisable), for municipalities prior to sending the layoff notice or notice of abolishment.
 1. Lack of Funds. O.R.C. §124.321(B)(1)
 2. Lack of Work. O.R.C. §124.321(C)(1)
 3. Abolishment of Positions. O.R.C. §124.321(D)(3)
- B. Reasons of economy are outlines in O.R.C. §124.321(D)(2) as follows:
 - (a) Reasons of economy permitting an appointing authority to abolish a position and to lay off the holder of that position under this division shall be determined at the time the appointing authority proposes to abolish the position. The reasons of economy shall be based on the appointing authority's estimated amount of savings with respect to salary, benefits, and other matters associated with the abolishment of the position, except that the reasons of economy associated with the position's abolishment instead may be based on the appointing authority's estimated amount of savings with respect to salary and benefits only, if:
 - (i) Either the appointing authority's operating appropriation has been

reduced by an executive or legislative action, or the appointing authority has a current or projected deficiency in funding to maintain current or projected levels of staffing and operations; and

(ii) In the case of a position in the service of the state, it files a notice of the position's abolishment with the director of administrative services within one year of the occurrence of the applicable circumstance described in division (D)(2)(a)(i) of this section.

(b) The following principles apply when a circumstance described in division (D)(2)(a)(i) of this section would serve to authorize an appointing authority to abolish a position and to lay off the holder of the position under this division based on the appointing authority's estimated amount of savings with respect to salary and benefits only:

(i) The position's abolishment shall be done in good faith and not as a subterfuge for discipline.

(ii) If a circumstance affects a specific program only, the appointing authority only may abolish a position within that program.

(iii) If a circumstance does not affect a specific program only, the appointing authority may identify a position that it considers appropriate for abolishment based on the reasons of economy.

IV. ORDER OF LAYOFFS

A. When layoffs are necessary, the appointing authority decides in which classification layoffs will occur and how many employees will be laid off. O.R.C. §124.322

B. The DAS promulgates rules establishing the method for determining layoff procedures and the order in which employees will be laid off. O.R.C. §124.322

1. The order of layoffs must be based in part on length of service.
2. Several other factors may also be considered when determining the order of employee layoffs. O.R.C. §124.322. These "other factors" include:
 - a. Efficiency in service
 - b. Appointment type
 - c. Other factors the DAS considers appropriate ("catch-all" provision).

- C. Layoffs for the appointment categories shall occur in the following order (from first laid off to last) within each of the primary appointment categories:: O.R.C. §124.323(B)
1. Part-time probationary;
 2. Part-time permanent;
 3. Fulltime probationary; then
 4. Fulltime permanent.
- a. *Metzgar v. Summit County Children’s Service Bd.* (Franklin 1982), 8 Ohio App. 168, Ct. held that the fact that hours may be irregular, that the employee works his forty-hour week in a period of over five days, or that the work locations may vary from day to day does not necessarily preclude an employee from being “full-time” for purposes of layoff order.

V. ORDER OF DISPLACEMENT OR (“BUMPING”) RIGHTS

- A. A laid-off employee has the right to displace the employee with the fewest retention points in the classification from which the employee was laid off or in a lower or equivalent classification, in the following order (O.R.C. §124.324 (A)(1)-(3)):
1. Within the classification from which the employee was laid off;
 2. Within the classification series from which the employee was laid off;
 3. Within the classification the employee held immediately prior to holding the classification from which the employee was laid off except that employee must meet the minimum qualifications and served in the classification in the last 3 years.

A laid-off employee can displace an employee with the fewest retention points in the classification that the laid-off employee held prior to holding the classification from which he was laid-off as long as the employee meets the minimum qualifications of the prior classification and the employee held the position in the last three (3) years. O.R.C. §124.324(A).

- B. Displacement within the same appointing authority and layoff jurisdiction
1. After being laid off from the classified civil service, an employee shall displace another employee within the same appointing

authority and layoff jurisdiction (see below) in the following manner O.R.C. §124.324(B):

- a. Each laid-off employee possessing more retention points shall displace the employee with the fewest retention points in the next lower classification or successively lower classification in the same classification series. O.R.C. §124.324(B)(1).
 - b. Employees displaced by an employee with more retention points shall displace the employee with the fewest retention points in the next lower classification or successively lower classification in the same series. This process shall continue, if necessary, until the employee with the fewest retention points in the lowest classification of the classification series of the same appointing authority has been reached and, if necessary, laid off. O.R.C. §124.324(B)(1).
- C. Notice of intention to displace: Employees shall notify the appointing authority of their intention to exercise their displacement rights within five days after receiving notice of layoff.

VI. LAYOFF LISTS AND REINSTATEMENT RIGHTS

- A. Layoff Lists O.R.C. §124.327(A)
1. Employees who have been laid off or who have been displaced to a lower classification in their classification series, shall be placed on layoff lists.
 2. Employees with the most retention points within each category of order of layoff shall be placed at the top of the layoff list to be followed by employees in descending order based on their number of retention points.
 3. Laid-off employees shall be placed on layoff lists for each classification in the classification series equal to or lower than the classification in which the employee was employed at the time of layoff.
 4. Notice to non-state employers: For purposes of layoff lists and reinstatement, employees who do not work for the state can only be placed on layoff lists of their own appointing authority. O.R.C. §124.327(I). Therefore, non-state employees should ignore. See Section B(2) below.

- B. Reinstatement Rights O.R.C. §124.327(B)
1. Rights within the agency (appointing authority) from which the employee was laid off
 - a. Reinstatement rights last one year.
 - b. During the period (one year), in any layoff jurisdiction in which an appointing authority has an employee on the layoff list, the appointing authority shall not hire or promote anyone into that classification until all the people on the layoff list for that classification are reinstated or decline the position when it is offered. O.R.C. §124.327(B)
 2. Rights with other agencies (appointing authorities) within the layoff jurisdiction
 - a. Reinstatement rights only exist for the same classification in the other agencies.
 - b. Reinstatement rights only arise after layoff lists for the employees appointing authority have been exhausted. O.R.C. §124.327(C)
 3. Reinstatement procedures
 - a. Any employee accepting or declining reemployment to the same classification and same appointment type from which the employee was laid off or displaced shall be removed from the appointing authority and jurisdictional layoff list. O.R.C. §124.327(D)(E).
 - b. Employees who do not exercise their displacement rights under O.R.C. §124.324 shall only be entitled to reinstatement in the classification from which the employee was laid off. O.R.C. §124.327(F).
 - c. Employees who decline reinstatement to lower classifications in the classification than laid off or displaced from will only be entitled to reinstatement to higher or former classification in the classification series; except that if the employee was a fulltime employee. He/she may decline reinstatement to a part-time position. O.R.C. §124.327(G).

- d. There shall be no probationary period for employee reinstated or reemployed upon reinstatement, except that an employee laid off during an original or promotional probationary period shall begin a new probationary period upon reinstatement. O.R.C. §124.327(H)
- i. *Bashford v. City of Portsmouth* (1990), 52 Ohio St. 195, Ohio Supreme Court held that an employee who served four months as a probationary patrolman before he was laid off and who was recalled twenty-one months later and served another eleven months before being discharged was required to begin a new one-year probationary period upon recall pursuant to statute. Therefore, the Court found the employee to be properly terminated under state and local laws when he was terminated after eleven months following his recall from layoff.

VII. APPEAL FROM LAYOFFS

O.R.C. §124.328: “A classified employee may appeal a layoff, or a displacement as a result of a layoff, to the state personnel board of review. The appeal shall be filed or post-marked no later than ten days after receipt of the notice of layoff or after the employee is displaced... Classified employees... may appeal the decision of the state personnel board of review to the common pleas court... in accordance with O.R.C. §119.12.

Note: Employees laid off from a municipality may appeal the layoff to the CSC and appeals will be taken under the appropriate statutory procedure.

Christophel v. Kukulinsky, 61 F.3d 479 (C.A. 6 (Ohio) 1995), the Sixth Circuit Court of Appeals held that, under Ohio law, unclassified civil servants have no right to appeal adverse job actions to the state personnel board of review, unless the appeal is coupled with a claim that the employee was improperly designated as unclassified.

VIII. SPECIAL ISSUES

- A. Classification Plan
- B. Court Challenges – Injunctions
- C. Picketing

PART 2 COLLECTIVE BARGAINING

I. COLLECTIVE BARGAINING AGREEMENTS vs. CIVIL SERVICE - WHICH PROCEDURE APPLIES?

- A. If Civil Service, see State and DAS/SPBR process
- B. Collective Bargaining Agreement (CBA)

- 1. Is the CBA language waiving civil service provisions adequate? The following are examples of language from two contracts.

Section 1.6 Exclusion. The parties acknowledge that during the negotiations which resulted in this Agreement, each had the unlimited right and opportunity to make demands and proposals with respect to any subject matter not removed by law from the area of collective bargaining, and that the understandings and agreements arrived at by the parties after the exercise of that right and opportunity are set forth in this Agreement. Therefore, the Employer and the Union for the life of this Agreement, each voluntarily and unqualifiedly waives the right, and each agrees that the other shall not be obligated to bargain collectively with respect to any matter or subject referred to, or covered in this Agreement.

Section 32.1 Waiver. No section of the civil service laws contained in Ohio Revised Code sections 124.01 through 124.56 shall apply to employees of the bargaining unit, and it is expressly understood that the Ohio Department of Administrative Services and the State Personnel Board of Review shall have no authority or jurisdiction as it relates to employees in the bargaining unit, except as prohibited by Ohio Revised Code section 4117.08(B). Further, where a topic or issue is addressed in this Agreement, it will be understood that the language of the Agreement will prevail over any conflicting language including statutory language which is not specifically addressed in this Agreement but related to the topic or issue.

- 2. Does the CBA have a layoff procedure? How Specific? (See Example CBA language, attachment.)
- 3. Evaluate whether CBA replaces the civil service provisions and/or determine from Union if it will agree to the provisions in the CBA.

State ex rel. OAPSE v. Batavia Local School Dist. Bd. Of Ed.,
(2000) 89 Ohio St. 3d 191.

The Supreme Court addressed the provisions of O.R.C. §4117.10(A) and the specificity required to supercede other laws. The Court held that the collective bargaining agreement must contain language with specificity in order to exclude statutory rights.

Clark County Sheriff v. FOP/OLC, (1995) 1995 Ohio App. LEXIS 558 (2d Cir.)

The Appeals reversed the arbitrator's decision reinstating employees from layoff. In this case, the arbitrator applied the procedural requirements of O.R.C. section 124.321 (filing a statement of rationale with ODAS) despite the fact that the collective bargaining agreement made no reference to the Ohio Revised provisions. The Court concluded that the procedures contained in Chapter 124 concerning layoffs did not apply because there was no evidence of an intent by the parties to incorporate the statutory provisions in the collective bargaining agreement (emphasis supplied). See also, FOP/OLC v. Perry County Commissioners, et al., 2003 Ohio 4038, 2003 Oh. App. LEXIS 3601 (7/24/03, Fifth App.Dist.) and Jackson Co. Sher. V. FOP/OLC, 2004 Ohio 3535; 2004 Oh. App. LEXIS 3191 (6/30/04, Fourth App.Dist.).

C. Does past practice regarding layoffs exist? Example language:

Section 5. The Employer and Labor Council acknowledge that certain customs and practices presently exist on an agency-wide basis with respect to operation of the Sheriff's Office that are too detailed to be set forth herein. When those customs and practices fall within Management Rights as set forth in Article 6 herein, the Employer agrees not to alter them without notice to the Labor Council Committee Chairperson, when practicable.

When the above-referenced customs and practices do not fall within Management Rights as set forth in Article 6 herein, then the Employer agrees not to alter them without prior notice to the Labor Council Committee Chairperson.

A meeting of the Labor/Management Committee to discuss those alterations will be held should the Labor Council so request. If the proposed alteration violates any specific provision of this Agreement, it is then subject to the Grievance Procedure.

II. EXAMINATION PROCESS /CHECKLIST OF VARIOUS COLLECTIVE BARGAINING PROVISIONS

Does Collective Bargaining Agreement “completely” replace the civil service?

Review various collective bargaining provisions, including:

- A. Layoff Provisions
 - 1. Displacement from or to non-bargaining unit positions.
- B. Seniority Provisions - various versions
 - 1. Bargaining unit
 - 2. Classification
 - 3. Service date with employer
 - 4. Seniority for union representatives (super seniority)
 - 5. Example language

Section 1 Seniority is defined as an employee’s continuous fulltime service since their last date of hire with the Employer. Classification seniority shall mean the date of appointment to either of the two (2) SERB certified units. When more than one (1) employee is hired on the same date, the most senior employee will be determined by who has the highest last four (4) digits of their social security number.

Once each year, the Employer shall provide to the Labor Council Representative a seniority list showing the classification service and continuous service of each employee.

- C. Does the contract contain language excluding “prior service” definition of civil service law R.C. §9.84 or does prior service count in seniority?
- D. Does the Collective Bargaining Agreement place any limits on the ability to layoff? e.g. minimum staffing/manning.
- E. Burden of proof on employer for establishing need for and procedural requirements of layoff.
- F. Burden of proof on employees (union) to establish any allegations of bad faith, disparate treatment, subterfuge or procedural error
- G. Unless there is specific language in the CBA there is no duty to negotiate the decision to layoff but ... wise to review with Union, opportunity to discuss. See pre-layoff procedure in the CBA.

In re: Cuyahoga County Board of Commissioners, SERB 89-006 (3/15/89)
Although O.R.C. section 4117.08(C)(5) gives the employer the right to layoff, this right is limited by other obligations set forth in Chapter 4117 of the Ohio Revised Code. Even if layoffs are effectuated under Chapter 124 of the Ohio Revised Code, the employer must comply with the bargaining requirements under State collective bargaining statute.

In re: SERB v. Youngstown City School Dist. Bd. of Ed., SERB 95-010 (6-30-95)

The General Assembly did not contemplate that unions would become equal partners in the running of the enterprise in which they are employed: RC 4117.08(A) and 4117.08(C), read together, are an effort to somehow balance the need of public employers to make management decisions against the right of public employees to bargain about their working conditions, and this effort is not realized by requiring bargaining over every management decision that affects working conditions.

- H. Review bumping or displacement provisions of CBA as there may be limits:
- between bargaining units
 - from supervisor to bargaining unit
 - from bargaining unit to non-bargaining unit
 - ability to perform
- I. Other, hidden provisions/clauses in CBA's which may create substantive issues:
- minimum staffing/manning clauses (example language)
Article 19 Minimum Staffing Each shift in the jail and each shift on road duty shall be staffed with at least one (1) supervisor and four (4) deputies. The Employer will make every effort to maintain the minimum staffing level. However, it is expected that occasional lapses may occur throughout the next three (3) years that shall be reasonably construed by the Union. Should the absence of an Employee in the jail or on the road be the cause of mandated overtime, the mandated Employee shall be from the classification that caused the overtime.
 - use of non-bargaining unit employees
 - use of volunteers, part-time employees, intermittent employees (example language)
Article 34 Part-Time Officers
Section 34.1 The County may utilize one part-time officer that is certified under the laws of the State of Ohio and properly trained

and qualified pursuant to the standards existing in the _____ County Sheriff's Office.

Section 34.2 Part-time officers will not be utilized to perform any reimbursed extra duty overtime unless first offered to full-time officers, this includes volunteer work.

Section 34.3 All unscheduled overtime opportunities will first be offered to all full-time officers before it being filled by the utilization of part-time officers.

Section 34.4 Before any full-time officers may be laid off, all part-time officers shall first be laid off; and all full-time officers shall be called back to work before any part-time officers. A part-time officer is not to be utilized to fill in any shift during a lay-off.

Section 34.5 All part-time officers will initially be paid at the entry-level rate of pay for full-time officers, regardless of their experience.

Section 34.6 All special duty callouts and regularly scheduled special duty work (i.e. EV Tech, Traffic investigations, Detective duties), and all work that is funded by specialty grants (i.e. DUI enforcement) will be offered first to full-time employees.

- Zipper clauses
- successor provisions
- subcontracting provisions (example provisions)

Article 5 Subcontracting During the term of this Agreement, the Employer will not contract or subcontract work normally performed by employees covered by this Agreement if employees are on layoff or would be placed on layoff, unless the affected employees would be unable to perform the work in question due to lack of skills, equipment, schedule requirements or work volume.

Article 14 Special Deputies The parties agree that the Employer may continue to utilize special deputies for special details, such as parades, fairs, special traffic control, scheduled educational events, and declared emergencies in which regular forces are not deemed adequate to fulfill the Employer's mission. Transportation of prisoners shall not be treated as special detail.

- Right to subcontract for "efficiency"

Generally public employers have authority to subcontract when it can be shown that it is for "efficient operation" (RC §124.321) CWA v. OSU 24 Oh. St. 3d 191 (1986). The issue becomes more difficult under a collective bargaining agreement if the layoff language does not allow or provide for layoffs for the efficiency of operations.

- non-discrimination provisions in CBA
- civil service or collective bargaining agreement
- Reasonable accommodation positions (ADA)
- Impact on older workers (ADEA)
- Family Medical Leave Act (FMLA)
- Legitimate non-discriminatory reasons (challenges under discrimination laws)

III. LAYOFFS AND SERB - UNFAIR LABOR PRACTICES OF UNIONS

A. Picketing, not related to labor dispute, under R.C. Chapter 4117

1) Freedom of Speech and Picketing

In In re: OCSEA, 1994 SERB at 3-62 to 3-63, the Board examined both the purposes of Chapter 4117 and the legitimate state interests for requiring a ten-day notice related to Chapter 4117 rights and issues. The Board summarized its analysis as follows:

Picketing by bargaining unit employees may involve any of those areas delineated above intended to be regulated by Chapter 4117, including but not limited to picketing related to recognition demands, unfair labor practices, to bring pressure or publicity to bear on contract negotiations, picketing related to a strike. Accordingly, ... ‘any picketing’ which relates to those activities intended by the Legislature to be regulated by Chapter 4117 and falling within SERB’s jurisdiction pursuant to Chapter 4117 constitutes picketing subject to the notice requirements of §4117.11(B)(8). Hence, purely informational picketing related to First Amendment rights not intended to be regulated by Chapter 4117, such as in support of political candidates or general social issues not related to a labor relations dispute involving a public employer or public employee rights under Chapter 4117, is not subject to the notice requirements of §4117.11(B)(8).

B. Duty of Fair Representation allegations against Union by employees

PART 3 PREPARING, PRESENTING AND PROVING LAYOFFS AND JOB ABOLISHMENTS

I. ESTABLISHING THE FINANCIAL POSITION (LACK OF FUNDS)

- #### **A. Show trends of fiscal position (be ready to show details)** **Show trend/projection based on current income and expenses**

- income/receipts (by category)
- expenses (including health insurance)
- carryover balances - trend (can show deficit spending)

- B. Show reasonable efforts to project/reduce expenditures

- C. Show reasons for reduced income (e.g. tax receipts, investment income)

- D. Alternate income, efforts made to explore optional, additional sources of income (letters written, etc.)

- E. Establish the amount of carryover needed

- F. Show reasons/restrictions on funds
 - capital funds
 - restricted funds

- G. Be ready to explain every expenditure

- H. Show efforts to reduce costs
 - positions not filled
 - equipment purchases delayed or canceled

- I. Demonstrate all calculations to determine layoff

- J. Show costs of layoff, including
 - unemployment compensation costs
 - conversion of:
 - compensatory time
 - vacation leave
 - personal leave

- K. Be prepared to explain why some classifications or positions are not affected (to respond to allegations of targeting or disparate treatment)

- L. For specific operations demonstrate why and how these are separately funded

- M. Policy: Explain why
 - funds not available
 - funds not transferred

- N. Tax or levy: efforts to increase income
 - user fees
 - ballot efforts

II. PRACTICAL AND POLICY ISSUES

- A. Be ready to explain/respond how the employer will continue to provide service
- B. Identify/differentiate between
 - required (necessary) services
 - optional services
- C. Be prepared to explain why certain programs, functions were not affected
 - those positions which generate revenues
 - those positions independently financed
 - restricted funds: CDJFS, County Engineer, DARE, Public Defender, Veterans Service Commission, courts
 - separate fund
 - separate appointing authority
 - mandated services

III. OPTIONS TO LAYOFF (INITIAL ISSUE: CLASSIFIED OR UNCLASSIFIED)

- All unclassified subject to work schedule modification
- Reduced workweek
- Voluntary layoff (furlough)
- Have employees waive payouts
- Furlough/temporary layoff (widely used in private sector)
- Reduction in benefits
- Part-time status

IV. WHAT ARE COMMON REASONS LAYOFFS ARE OVERTURNED?

- Layoffs disproportionately affect bargaining unit classifications and not supervisory, managerial employees
- Failure to adequately prove or explain lack of funds
- Failure to establish what/why other funds not available
- Subterfuge: targeted positions; “favorites” not laid off
- Procedural flaws
- Transfer of employees
- Other, nonessential services continued
- Failure to establish policy reasons for decisions

V. PRACTICE TIPS FOR PRESENTING A LAYOFF CASE (SPBR, CSC, OR ARBITRATION)

- use person best able to explain and respond to financials
- show efforts made/considered for additional funds
- have department head/elected official prepared to testify for the policy reasons
- use the civil service case law to support your position and/or explain process

- educate the arbitrators of the standard
- exchange documents in advance of hearing
- Show efforts made to avoid/reduce layoffs
- Have case ready before layoff
- Take time rather than rush
- Get DAS review in advance
- Costs
- Use single charts and summaries and have supporting documents available
- Use best fiscal information
- Have economic expert ready to testify e.g. Auditor, Fiscal Officer, etc.

Presentations/Layoffs/10-30-08 layoffs abolishments civil service

ATTACHMENT**EXAMPLE CONTRACT LANGUAGE****ARTICLE 13 - LAYOFF AND RECALL**

Section 13.1 **Reasons For Layoff** The Employer may lay off employees in the bargaining unit for reasons of lack of work, lack of funds, or job abolishment (which may include abolishment for reorganization or for the efficient operation of the office.) The Employer shall have the burden of establishing the need for a layoff. It is understood and agreed that no provisions of civil service law or rules shall apply to layoffs.

Section 13.2 **Notification** The Employer shall notify and meet with the Union no less than fourteen (14) calendar days prior to any impending abolishment or layoff of personnel to discuss alternatives and/or establish the bumping order. The layoff list and bumping order shall be posted on Office bulletin boards ten (10) calendar days prior to the effective date of the abolishment or layoff.

Section 13.3 **Layoff**

- A. When it becomes necessary to reduce the number of employees in the employ of the Employer, such reduction shall be initially by classification (rank) in accordance with each employee's classification seniority within the Sheriff's Office.
- B. The order of layoff shall be as follows:
 - 1. Temporary, part-time, seasonal or intermittent;
 - 2. Employees serving an initial probationary period;
 - 3. Full-time employees who have completed their probationary periods.

Section 13.4 **Displacement** An employee who is laid off from a classification may displace another employee in an equally well paid or lower classification (rank) in which the employee is qualified provided the employee has more total seniority with the Sheriff's Office. That is, an employee may displace to a lower rank in a rank covered by this Agreement (i.e., Lieutenant to Sergeant). Where appropriate, employees may displace to a rank in the other bargaining unit (i.e., Sergeant to Deputy). Any displacements thereafter must be in accordance with the procedure in the other agreement. Any employee displacing must have greater departmental security than the employee displaced.

Section 13.5 **Recall** Recalls after layoff shall be in inverse order of layoff by classification from which the employee was laid off. Laid off employees shall maintain recall rights for a period of two (2) years. Recall shall first be for those employees displaced to a lower classification or rank. Any employee who refuses a recall to a position shall be removed from the recall list.

Section 13.6 **Recall Notice** Notice of recall shall be sent to the employee by certified mail with a copy to the Fraternal Order of Police, Ohio Labor Council, Inc. The Employer shall be deemed to have fulfilled its obligations by mailing the recall notice by certified mail, and return receipt requested, to the last mailing address provided by the employee. It is the responsibility of the employee to provide the Employer with a written notice of any change of address and/or telephone number during the employee's period of layoff.

Section 13.7 **Reporting** An employee recalled from a layoff shall have fourteen (14) calendar days following the receipt or attempted delivery of the recall notice in which to report for duty, unless a later date for returning to work is otherwise specified in the notice. The time limits provided in this section may be extended by the Employer if circumstances beyond the control of the employee prevented timely response by the employee to the recall notice.